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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

LUIS RODRIGUEZ,

Defendant and Appellant.

E040066

(Super.Ct.No. RIF123357)

OPINION

APPEAL from the Superior Court of Riverside County. Robert George Spitzer,
Judge. Affirmed with directions.

Athena Shudde, under appointment by the Court of Appeal, for Defendant and
Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Gary W. Schons, Senior Assistant Attorney General, Barry Carlton,
Supervising Deputy Attorney General, and Marissa Bejarano, Deputy Attorney General,
for Plaintiff and Respondent.

A jury convicted defendant and appellant Luis Rodriguez of being a prisoner in possession of a stabbing weapon. (Pen. Code, § 4502, subd. (a).)¹ In a bifurcated proceeding, defendant admitted that he had prior strike convictions for assault with intent to rape (§ 220) and forcible rape (§ 261, subd. (a)(2)), within the meaning of sections 667, subdivisions (c) and (e)(2)(A), and 1170.12, subdivision (c)(2)(A). The trial court sentenced him to 25 years to life in state prison.

On appeal, defendant contends that the court erred in denying his *Wheeler/Batson*² motion (hereinafter *Wheeler* motion). He also contends the abstract of judgment should be corrected to conform to the oral pronouncement of judgment. The People concede that the abstract of judgment should be corrected. Otherwise, the judgment is affirmed.

FACTUAL BACKGROUND³

Defendant was an inmate at the California Rehabilitation Center. Two correctional officers searched him after receiving an anonymous tip. They found an “inmate manufactured weapon” consisting of a sharpened piece of metal attached to a razor base in his pocket.

¹ All further statutory references will be to the Penal Code unless otherwise noted.

² *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*); *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*).

³ Since the issues on appeal do not involve the facts of the underlying case, only a brief recitation of the facts will be given.

ANALYSIS

I. The Court Properly Denied Defendant's Motion

Defendant contends that the trial court committed reversible error by denying his *Wheeler* motion. Defendant argues that he made a prima facie showing that the prosecutor used one of his peremptory challenges to exclude a juror solely on the basis of race. We agree with the trial court that defendant failed to make a prima facie case and that the prosecutor stated a valid, nondiscriminatory purpose for the challenge. Thus, the court properly denied defendant's *Wheeler* motion.

A. Background

G.W. was a potential juror in defendant's case. In response to the court's questions, G.W. stated that she was single, had no children, and worked for the University of California at Riverside as an outreach program supervisor. She had never been a crime victim or had a negative experience with law enforcement. Her cousin was a police officer. G.W. had never been a juror before and she said that nothing in her background would cause her to be unfair.

The prosecutor exercised a peremptory challenge against G.W. and defense counsel asked to approach the bench. Defense counsel made a *Wheeler* motion, noting that G.W. was the only Black person on the panel. Defense counsel further asserted that nothing G.W. said revealed a bias toward either party and that G.W. said she could remain neutral. The court stated that the People exercised three peremptory challenges, the second one being against G.W. The court noted that, although G.W. was the only Black person in the jury box at the time, she was not the only Black person on the panel.

The court observed that prospective juror No. 17 was Black,⁴ and further noted that defendant was not Black. The court concluded that it did not find a prima facie showing that G.W. was excused for improper, racially motivated purposes. The court nonetheless permitted the prosecutor to state his reason on the record for exercising a peremptory challenge against G.W. The prosecution explained that he excused G.W. because whenever the court said something that the rest of the jurors responded to or laughed at, G.W. never smiled or responded in any way. She remained stoic or shook her head. The prosecutor did not notice her respond to any comments made by him, the court, or defense counsel. The prosecutor stated that he did not want a juror who was not going to agree or disagree, even if it was an obvious question. The prosecutor was concerned because G.W. lacked any emotional response. The court agreed with the prosecutor's observations.

B. Defendant Failed to Establish a Prima Facie Case

When a defendant raises a *Wheeler* challenge based on race, a three-step analysis is required. First, the defendant must make a prima facie case of racial discrimination. Second, the burden shifts to the prosecution to offer a race-neutral explanation for excluding the juror. Third, if a race-neutral explanation is tendered, the trial court must determine whether the defendant has proven purposeful racial discrimination. (*People v. Silva* (2001) 25 Cal.4th 345, 384.) The trial judge is in the best position to determine,

⁴ Juror No. 17 was later excused by the stipulation of both parties.

under all the circumstances of the case, whether there was a reasonable inference that prospective jurors were challenged because of their race. (See *People v. Bell* (2007) 40 Cal.4th 582, 596; *People v. Davenport* (1995) 11 Cal.4th 1171, 1201 (*Davenport*).)

“When a trial court denies a *Wheeler* motion because it finds no prima facie case of group bias was established, the reviewing court considers the entire record of voir dire.

[Citation.] ‘If the record “suggests grounds upon which the prosecutor might reasonably have challenged” the jurors in question, we affirm.’ [Citations.]” (*Davenport, supra*, at p. 1200.)

In *People v. Cornwell* (2005) 37 Cal.4th 50 (*Cornwell*), the Supreme Court held that a defendant fails to establish a prima facie case when he only asserts that the excused prospective juror: 1) was one of two Black individuals in the venire; and 2) would not have been subject to excusal for cause. (*Id.* at pp. 69-70.) The court asserted that the mere fact that a prospective juror is Black is insufficient to establish a prima facie case, citing *People v. Box* (2000) 23 Cal.4th 1153, 1188-1189. (*Cornwell, supra*, at p. 70.) The court also stated that “[t]he circumstance that the juror was not subject to exclusion for cause certainly did not support an inference that the exercise of a peremptory challenge against her was motivated by group bias.” (*Ibid.*)

Similarly, in *People v. Turner* (1994) 8 Cal.4th 137 (*Turner*), the Supreme Court concluded that the defendant failed to establish a prima facie case when “the only bases for establishing a prima facie case cited by defense counsel were that all of the challenged prospective jurors were Black and either had indicated that they could be fair and impartial or in fact favored the prosecution.” (*Id.* at p. 167.)

Here, defendant failed to establish, from all the circumstances of the case, a reasonable inference that G.W. was challenged because of her race. In support of his claim in the trial court, defendant alluded to nothing more than the circumstance that G.W. was the only Black person on the panel at the time she was excused, and that she appeared to be neutral and said she could be fair. The mere fact that G.W. was Black was insufficient to establish a prima facie case. (*People v. Box, supra*, 23 Cal.4th at pp. 1188-1189.) Moreover, the circumstance that G.W. said she could be impartial did not support an inference that she was challenged because she was Black. (*Cornwell, supra*, 37 Cal.4th at p. 70.) “Jurors may be excused based on ‘hunches’ and even ‘arbitrary’ exclusion is permissible, so long as the reasons are not based on impermissible group bias. [Citation.]” (*Turner, supra*, 8 Cal.4th at p. 165.) In sum, defendant’s showing was insufficient to establish a prima facie case for discrimination. (*Cornwell, supra*, at p. 70; *Turner, supra*, at p. 167.)

Furthermore, even if defendant had established a prima facie case, the record clearly established a specific, race-neutral reason why a prosecutor might want to excuse G.W. As observed by both the prosecutor and the court, G.W. did not express any emotions or respond to remarks by the prosecutor, defense counsel, or court, unlike the other jurors. When the other jurors laughed at the court’s comments or jokes, she remained stoic or shook her head. The prosecutor stated that he did not want a juror who was not going to agree or disagree, even if it was an obvious question. The prosecutor justifiably excused G.W. since “peremptory challenges are properly made in response to “‘bare looks and gestures,’” or the demeanor of a prospective juror. [Citations.]”

(*Davenport, supra*, 11 Cal.4th at p. 1203.) Furthermore, a juror who indicates that she may cling to an opinion regardless of the views of other jurors “constitutes a legitimate concern for the prosecution, which seeks a jury that can reach a unanimous verdict.”

(*Ibid.*)

Defendant claims that the trial court either misunderstood or purposefully ignored the required three-step analysis. However, the record indicates that the court properly ruled on the *Wheeler* motion. Since the court found that defendant failed to establish a prima facie case of discrimination, the three-step analysis ended there. We note that, although the court expressly determined that defendant had not made a prima facie showing of race discrimination and denied the defense motion on that basis, it permitted the prosecutor to comment upon defendant’s claim.

Defendant further asks us to examine the responses of jurors other than G.W. in determining whether the trial court erred in finding that defendant failed to establish a prima facie case of group bias. However, “although such an examination is appropriate at the trial court level when the issue properly is brought to that court’s attention, such an examination for the first time on appeal is unreliable. [Citations.]” (*Cornwell, supra*, 37 Cal.4th at p. 71.)

Defendant also claims that the court relied on G.W.’s obesity “to ascribe its own validity to the prosecutor’s reasons for the challenge.” Although the court did comment that G.W. appeared to be “morbidly obese,” the court made such comment after it had already determined that defendant failed to establish a prima facie case. Thus, while the

court's remark may have been inappropriate, it did not affect the court's determination of defendant's *Wheeler* motion.

In sum, the court properly found that defendant failed to establish a prima facie case of racial discrimination.

II. The Abstract of Judgment Should Be Corrected

Defendant contends that the abstract of judgment should be corrected to reflect the trial court's oral pronouncement of judgment. The People correctly concede.

“An abstract of judgment is not the judgment of conviction; it does not control if different from the trial court's oral judgment.” (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.) Appellate courts may correct clerical errors of abstracts of judgment that do not accurately reflect the oral judgments of sentencing courts. (*Ibid.*)

At the sentencing hearing, the court sentenced defendant to 25 years to life in prison under sections 667, subdivisions (c) and (e), and 1170.12, subdivision (c). It also imposed a \$1,000 parole revocation fine under section 1202.45, stayed upon successful completion of defendant's time in custody or on parole. The abstract of judgment indicates that defendant was sentenced to 25 years to life in prison under section 667.61. Furthermore, it does not reflect that the court imposed a parole revocation fine pursuant to section 1202.45. The abstract of judgment should be corrected to reflect the oral pronouncement of judgment.

DISPOSITION

The matter is remanded to the trial court with directions to correct the abstract of judgment to show that the court sentenced defendant pursuant to Penal Code sections

667, subdivisions (c) and (e), and 1170.12, subdivision (c). Furthermore, the abstract of judgment should be corrected to reflect that the court imposed a parole revocation fee of \$1,000 under Penal Code section 1202.45. The amended abstract of judgment and minute order shall be forwarded to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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HOLLENHORST
Acting P.J.

We concur:

McKINSTER
J.

RICHLI
J.